Supreme Court, U.S.
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No. 02-1667

In the Supreme Court of the United States

STATE OF TENNESSEE, PETITIONER

v.

GEORGE LANE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 to 12165, is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' Eleventh Amendment immunity from suit.

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OPINIONS BELOW

The amended opinion of the court of appeals on panel rehearing (Pet. App. 1-5) is reported at 315 F.3d 680. The original opinion of the court of appeals (Pet. App. 10-11) and the order of the district court denying petitioner's motion to dismiss (Pet. App. 6-7) are unreported.

JURISDICTION

The court of appeals entered its original judgment on July 16, 2002. A petition for panel rehearing was filed, and the court of appeals issued its amended opinion on January 10, 2003. On March 4, 2003, Justice Stevens extended the time within which to file a petition for a writ of certiorari to May 12, 2003, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States intervened in this action in the court of appeals to defend the constitutionality of the Disabilities Act's abrogation of the States' Eleventh Amendment immunity from suit for cases brought under Title II of the Act. The court of appeals sustained the constitutionality of the abrogation as applied in this case. For the reasons explained below, and in particular the fact that the Court has already granted certiorari on this issue on three prior occasions, the United States respectfully suggests that the petition for a writ of certiorari should be granted.

1. The Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.*, is a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). The Disabilities Act targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities. In passing the Disabilities Act, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. 12101(b)(4).

The Disabilities Act's prohibitions on discrimination are enforceable against public entities through private suits. See, *e.g.*, 42 U.S.C. 12133; see also *Olmstead* v. *L.C.*, 527 U.S. 581, 590 (1999). In the Disabilities Act,

Congress expressly abrogated the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 12202 (a "State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter").

This case involves a suit under Title II of the Disabilities Act, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is expressly defined to include "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. 12131(1)(A) and (B).

2. Respondent George Lane has paraplegia and uses a wheelchair to ambulate. In 1996, petitioner charged Lane with two misdemeanor offenses and summoned him to appear before the state court, which was sitting in the Polk County Courthouse in Benton, Tennessee, to answer the charges. All court proceedings in that courthouse take place on the second floor. At the time, the building had no elevator. At his first appearance, Lane crawled up two flights of stairs to get to the courtroom. He was arraigned and ordered to appear at a later date for his hearing. When Lane returned to the courthouse for that hearing, he notified the court that he would not crawl to the courtroom again and further declined to be carried by officers. The court then ordered Lane's arrest, and he was taken into custody and jailed. In all further proceedings, Lane was left on the ground floor of the courthouse while his counsel shuttled back and forth between him and the second-

floor courtroom. Additional proceedings were held on the ground floor of the courthouse in locations that were not open to the public. Pet. App. 15-16. Lane filed emergency appeals with the Tennessee Court of Criminal Appeals and the Tennessee Supreme Court, both of which were denied. See *id.* at 16-17. The trial court subsequently entered an order holding the remainder of the criminal proceedings in abeyance pending the construction of an elevator at the courthouse. *Id.* at 17.[1]

Respondent Beverly Jones also has paraplegia and uses a wheelchair to ambulate. Jones is a certified

[1] Petitioner subsequently dismissed one of the misdemeanor charges, and Lane pled guilty to the other, which was a charge of driving with a revoked license. The present action does not attempt to impeach Lane's conviction, because the conviction was entered during a proceeding in which he had access to the courtroom. Furthermore, during the emergency appeal proceedings at the preliminary stage of the prosecution, petitioner advised Lane that the criminal charges "are separate and distinct from any alleged violations based on the Americans with Disabilities Act," and that "[a]ny relief on the alleged [Disabilities Act] violations would need to be presented in a civil lawsuit, in either a state or federal civil court of record." Tenn. Opp. to Applic. for Permission to Appeal at 6 n.1, *Tennessee* v. *Lane*, No. 03C01-9704-CR-00158 (Tenn. S. Ct.). The state trial court likewise directed Lane to pursue separate civil relief for his claimed Disabilities Act violations. 3/17/97 Tr. at 5, *Tennessee* v. *Lane*, No. 97-017 (Polk County Crim. Ct.) (reproduced as Exhibit D to Lane's Applic. for Extraordinary Appeal, *Tennessee* v. *Lane*, No. 03C01-9704-CR-00158 (Tenn. S. Ct.) ("I think you have the right to sue the county and cause them to do these things you're talking about. But I don't think that it would result in dismissal of your client from criminal court."); see also *id.* at 7-8. This case accordingly does not appear to implicate the *Rooker-Feldman* doctrine, see *District of Columbia Ct. of App.* v. *Feldman*, 460 U.S. 462, 482 (1983); *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923).

court reporter in Tennessee. Her inability to access numerous state court proceedings due to the inaccessibility of the courthouses in which hearings are held has impaired her ability to attract clients and to offer, provide, and complete services for her clients. Pet. App. 19-20.

Lane and Jones filed suit against petitioner and 25 Tennessee counties alleging that their ongoing operation of courthouses that are inaccessible to members of the public with mobility impairments violates Title II of the Disabilities Act. Lane and Jones also seek to represent a class of persons who, because of their physical disabilities, cannot access courthouses in Tennessee. The complaint seeks injunctive relief and damages. Pet. App. 23-28. Petitioner filed a motion to dismiss on Eleventh Amendment grounds, which the district court denied. *Id.* at 6-7.

3. Petitioner filed an interlocutory appeal, see *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), and the district court stayed further proceedings in the case and a ruling on the motion for class certification pending resolution of that appeal. The United States intervened on appeal.

While the appeal was pending, the en banc court of appeals issued its decision in *Popovich* v. *Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir.), cert. denied, 123 S. Ct. 72 (2002). In *Popovich*, the Sixth Circuit held that Congress validly abrogated the States' Eleventh Amendment immunity for claims under Title II that are based on due process principles, but not for claims based on equal protection principles.

Applying *Popovich*, the court of appeals issued an unpublished, per curiam order in the instant case affirming the district court's denial of petitioner's motion to dismiss on the ground that Lane's and Jones's claims

implicate due process principles. Pet. App. 10-11. On petitioner's motion for panel rehearing, the court of appeals issued an amended opinion, *id.* at 1-5, that again affirmed the district court's denial of the motion to dismiss. The court noted that, under *Popovich*, "Title II is an appropriate means of enforcing the due process rights of individuals," and that "Jones and Lane are seeking to vindicate their right of access to the courts in Tennessee." *Id.* at 5. Beyond that, the court explained that "[t]he difficult questions" concerning whether Lane's and Jones's claims ultimately vindicate due process rights "cannot be clarified absent a factual record." *Ibid.* The court of appeals accordingly remanded the case for further proceedings.

DISCUSSION

The government agrees with petitioner (Pet. 8-14) that the question of Congress's power to abrogate the States' Eleventh Amendment immunity for claims under Title II of the Disabilities Act is an important question that merits review by this Court in this case. Since this Court's decision in *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), which invalidated the abrogation of Eleventh Amendment immunity for Title I of the Disabilities Act, the courts of appeals have broadly divided on the constitutionality of Congress's abrogation of Eleventh Amendment immunity for Title II of the Disabilities Act. The Fourth, Fifth, Seventh, Eighth, and Tenth Circuits have held that the abrogation for Title II suits cannot be sustained as valid Section 5 legislation. See *Wessel* v. *Glendening*, 306 F.3d 203 (4th Cir. 2002); *Reickenbacker* v. *Foster*, 274 F.3d 974 (5th Cir. 2001); *Walker* v. *Snyder*, 213 F.3d 344 (7th Cir. 2000), cert. denied, 531 U.S. 1190 (2001); *Randolph* v. *Rodgers*, 253

F.3d 342, 345 n.4 (8th Cir. 2001); *Thompson* v. *Colorado*, 278 F.3d 1020 (10th Cir. 2001), cert. denied, 535 U.S. 1077 (2002). The Ninth Circuit has upheld the abrogation. See *Hason* v. *Medical Bd.*, 279 F.3d 1167, cert. granted, 123 S. Ct. 561 (2002), cert. dismissed, 123 S. Ct. 1779 (2003). The Second Circuit has held that the abrogation can be sustained in Title II cases if the government's action was undertaken with "discriminatory animus or ill will towards the disabled." *Garcia* v. *S.U.N.Y. Health Sciences Ctr.*, 280 F.3d 98, 111 (2001). And the Sixth Circuit, in both this case and *Popovich* v. *Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (en banc), cert. denied, 123 S. Ct. 72 (2002), has held that the abrogation is invalid for claims enforcing the right to equal protection, but is valid for claims enforcing due process rights.[2]

Accordingly, the conflict in the circuits is mature and entrenched. The relevant legal issues have been thoroughly aired in the courts of appeals; postponing review is not likely to contribute to the reasoned resolution of the question presented. The volume of cases in which the question has arisen demonstrates that the question presented is of recurring importance and that conflicting decisions are likely to proliferate in the courts of appeals. Finally, because the court of appeals' decision implicates the constitutionality of a provision of federal civil rights law—a provision that has been held unconstitutional in whole or in part in seven

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[2] The issue is currently pending in four other circuits. See *Kiman* v. *New Hampshire Dep't of Corrs.*, No. 02-1099 (1st Cir.) (en banc oral argument scheduled for June 5, 2003); *Bowers* v. *NCAA*, No. 01-4226 (3d Cir.) (oral argument scheduled for July 8, 2003); *Goodman* v. *Ray*, No. 02-10168 (11th Cir.) (oral argument held Nov. 13, 2002); *Barbour* v. *WMATA*, No. 03-7051 (D.C. Cir.) (pending briefing).

circuits—the question presented is of broad and enduring importance and thus merits this Court's review.

Indeed, the appropriateness of the question for this Court's review is reflected in the fact that this Court previously has granted certiorari to resolve the question three times, including earlier in this Term. See *Medical Board* v. *Hason*, cert. granted, 123 S. Ct. 561 (2002), cert. dismissed on motion of petitioner, 123 S. Ct. 1779 (2003) (No. 02-479); *Garrett*, 531 U.S. at 360 n.1 (dismissing as improvidently granted that portion of the writ of certiorari addressing the constitutionality of the abrogation for Title II); *Alsbrook* v. *City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (en banc), cert. granted, 528 U.S. 1146, cert. dismissed, 529 U.S. 1001 (2000) (dismissed by agreement of the parties).

In short, the question presented is ripe for review, and the government has identified no factual, jurisdictional, or procedural barriers in this case that would stand as an obstacle to the Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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